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*Alton Coal Development, LLC*

**FILED**

**FEB 25 2013**

**SECRETARY, BOARD OF  
OIL, GAS & MINING**

**BEFORE THE BOARD OF OIL, GAS AND MINING  
DEPARTMENT OF NATURAL RESOURCES  
STATE OF UTAH**

<p>UTAH CHAPTER OF THE SIERRA CLUB, et al,</p> <p>Petitioners,</p> <p>vs.</p> <p>UTAH DIVISION OF OIL, GAS &amp; MINING,</p> <p>Respondent,</p> <p>ALTON COAL DEVELOPMENT, LLC and KANE COUNTY, UTAH,</p> <p>Respondent/Intervenors.</p>	<p><b>MOTION TO SUBMIT MEMORANDUM OF SUPPLEMENTAL AUTHORITY</b></p> <p>Docket No. 2009-019 Cause No. C/025/005</p>
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Alton Coal Development, LLC (“**Alton**” or “**ACD**”) moves and petitions the Utah Board of Oil, Gas and Mining (“**Board**”), pursuant to Utah Admin. Code R641-104-160 and R641-105-500, for permission to submit a Memorandum of Supplemental Authority in the above-captioned manner, and specifically related to the Board’s consideration of the appropriate legal standard

governing petitions for award of fees and costs. A copy of the proposed Memorandum is attached. In making this Motion, Alton asks to be excused from its Stipulation filed with the Board on December 5, 2012.

In support of this Motion, Alton sets forth the following facts, which constitute good cause for granting the Motion and accepting the Memorandum.

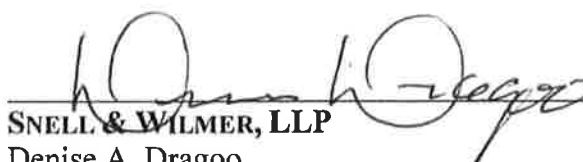
1. On February 18, 2013 Alton submitted its Reply Brief in this issue, according to the schedule set forth in the December 5, 2012 Stipulation.
2. Also on February 18, 2013, Alton's counsel were informed by the Division's counsel of the correspondence between the Division and the Office of Surface Mining, Reclamation and Enforcement ("OSM") wherein both the Division and OSM take the position that former Rule UMC/SMC 900(b)(ix), which in 1981 incorporated the Board's Rules of Practice and Procedure enumerated as B-1 through B-15, had never been rescinded and therefore remained in effect to control the Board's decision in this matter. See Letter from Division Director Baza to OSM Regional Director Al Klein dated February 13, 2013, Exhibit A to Division Memorandum Regarding the Status of the Utah Coal Program Rules Governing an Award of Attorney Fees dated February 19, 2013, ("**Div'n Memo**"); Letter from OSM Regional Director to Division Director, dated February 15, 2013, Exhibit B to Div'n Memo.
3. Petitioners Utah Chapter of the Sierra Club et al relied upon this exchange of correspondence in their Surreply Brief filed with the Board on February 22, 2013. The Division also relied on the February 13 and February 15, 2013 exchange of correspondence in its Memorandum filed on February 19, 2013.

4. February 18, 2013 was a legal holiday, and consequently neither the Division's nor OSM's records were available to Alton between the time the Division informed Alton's counsel of this correspondence, and the time that Alton's Reply Brief was to be submitted.
5. As expeditiously as possible after February 18, 2013 Alton searched the official records of the Division in Salt Lake City, and OSM in Denver.
6. Alton also examined legal authority in the Federal Register and Code of Federal Regulations related to the continued existence of the UMC/SMC rules.
7. Alton asserts that these legal authorities are directly on point and controlling of the question of whether UMC/SMC 900(b)(ix) remains an enforceable rule of Utah's Coal Program.
8. Alton found in the official records of the Division and OSM correspondence that shows that Utah sought, and OSM approved, repeal of Rule UMC/SMC 900(b)(ix) that both agencies now incorrectly believe remains in effect.
9. Alton further asserts that it located official records of the Division and OSM that clearly demonstrate that the Board's Rules of Practice and Procedure (as currently codified at R641 without the fee-shifting language) were provided to OSM and OSM approved of their use in replacement of the former Rules.
10. Alton could not reasonably have located and provided these authorities in its earlier pleadings because the Division's and OSM's reliance on Rule SMC/UMC 900(b)(b)(ix) was not disclosed to Alton's counsel until February 18.
11. Alton's counsel, by letter dated February 11, 2013 requested the Division to delay any response to OSM regarding the status of Rule B-15 (the former Board rule

addressing fee shifting) until this matter was fully briefed, argued and decided by the Board. Alton's counsel further requested a meeting or phone conference to review this matter. Repeated phone calls to the Division for a status report or meeting to discuss this matter went unanswered and counsel was belatedly informed that this matter was not Alton's business. Letter from Snell & Wilmer to Division Director Baza, dated February 11, 2013, Exhibit C to Div'n Memo.

In light of the foregoing facts, Alton advises the Board that controlling authority, not cited by any party, exists on the matter at issue, and that good cause exists to permit Alton to advise the Board of this authority via the attached Memorandum of Supplemental Authority.

SUBMITTED this 25th day of February, 2013.



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## CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of February, 2013, I e-mailed a true and correct PDF copy of the foregoing **MOTION TO SUBMIT MEMORANDUM OF SUPPLEMENTAL AUTHORITY** to the following:

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Southern Utah Wilderness Alliance

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Kane County Attorney

A handwritten signature in black ink, appearing to read "Kent Burggraaf", written over a horizontal line.